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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 18

UNITED STATES, PETITIONER

v.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, AND SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 84) is reported at 132 C. Cls. 115, and 131 F. Supp. 919.

JURISDICTION

The judgment of the Court of Claims in *Western Pacific* was entered on June 7, 1955 (R. 85). On the same date, entry of judgments in the *Bangor* and *Seaboard* cases was suspended pending determination of the exact amounts due (R. 85). A timely motion for rehearing in all three cases was denied by the Court

of Claims on October 4, 1955 (R. 87). On November 8, 1955, the Court of Claims, after determination of the exact amounts due, entered judgments in *Bangor* and *Seaboard* (R. 87, 88). The petition for a writ of certiorari was filed on December 9, 1955, and was granted on January 23, 1956 (R. 89). 350 U.S. 953. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the expiration of the two-year limitation period of Section 16(3) of the Interstate Commerce Act, while not barring suits by common carriers against the United States, nonetheless precluded referral to the Interstate Commerce Commission for a determination as to the reasonableness of the tariff rates demanded by the carriers, thus preventing the Government from establishing the unreasonableness of those tariff rates as a complete defense to the suits.

2. Whether the high, first-class tariff rates on explosive and incendiary bombs, which are intended to reimburse carriers for the heavy and unusual transportation expenses resulting from the necessity that such bombs be carried in accordance with the Interstate Commerce Commission Regulations on "Explosives and Other Dangerous Articles," apply to steel bomb cases which are *not* subject to the Regulations because they are filled with non-incendiary, non-explosive, and non-hazardous material.

3. Whether respondents Bangor and Seaboard are estopped from claiming that the high, first-class rates applied to the shipments over their lines.

STATUTES INVOLVED

The Interstate Commerce Act, § 16(3) (24 Stat. 384, as amended, 49 U.S.C. 16(3)), provides in pertinent part:

> (a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.
>
> (b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).
>
> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the Carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.
>
> (d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the two-year period of limitation in subdivision (c) a carrier subject to this part begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be ex-

tended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carier, and not after.

* * * * *

Act of September 18, 1940, § 322 (54 Stat. 955, 49 U.S.C. 66), provides:

Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

STATEMENT

These actions were brought in the Court of Claims by the three respondent rail carriers to recover the difference between tariff rates actually paid and those allegedly applicable to 211 Government shipments of steel bomb cases filled with Napalm gel. Approximately 200 of the shipments were made over the lines of respondents Bangor and Seaboard in 1944 (R. 23-43, 54-61). The remaining shipments were over respondent Western Pacific's lines in 1948 and 1950 (R. 1-3, 5-6).

The record, which consists primarily of pleadings and affidavits, discloses the following pertinent facts:

Napalm gel is gasoline which has been thickened or gelatinized by the addition of aluminum soap powders (R. 8, 10, 11, 13). This mixture is not capable of spontaneous combustion, is not self-igniting, and is not, therefore, incendiary (R. 8, 9, 10, 12, 13, 76-78, 79); like wood, paper, and a host of other articles, it will burn if ignited, but some outside incendiary agent must be supplied to set it on fire (R. 9, 10-11, 12, 13, 76-78, 79).

In a completed incendiary bomb, capable of functioning as such, the incendiary agent which ignites the Napalm gel is contained in the burster charge (R. 8, 10, 12, 13, 77). The burster is a steel tube inserted in the nose of a bomb and extending through its center, which contains a column of explosive TNT and a column of white phosphorous (R. 10).[1] The function of the explosive is to rip open the steel bomb case and scatter its contents. The white phosphorous is the incendiary or self-igniting agent, which ignites in the air when blasted out by the explosive charge and sets the Napalm gel on fire (R. 12, 79). In addition, a complete incendiary bomb contains a fuze. The fuze is a device in the nose of the bomb which, on impact, sets off a primer cup with a small explosion sufficient to fire the burster. The burster and fuze represent more than 75% of the construction cost of a complete bomb, whereas the steel case and Napalm filler comprise less than 25% of the cost (R. 10-11).

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[1] For further details as to the parts of a completed incendiary bomb, see *Union Pacific Railroad Co.* v. *United States*, 125 C. Cls. 390, 401.

It is undisputed that the shipments involved contained neither the burster nor the fuze and that they therefore did not contain either the incendiary element, *i.e.*, the white phosphorous, or the explosive element, *i.e.*, the TNT (R. 5). The only bomb parts shipped, as already noted, were the steel cases filled with gasoline which had been thickened by the addition of aluminum soap powders for the purpose of retarding the gasoline's free-flowing qualities (R. 8-9, 12, 76).

These steel bomb cases filled only with Napalm gel were similar to a "steel container filled with gasoline, with the exception that the Napalm gel filling does not flow as readily as gasoline and if ignited does not burn as rapidly as gasoline" (R. 76). Indeed, a "bomb body filled with Napalm Gel * * * presents considerabl[y] less hazard in transit, from a transportation viewpoint, than a drum filled with gasoline because Napalm Gel will not and can not leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline" (R. 9, 77). In light of these facts, the Bureau of Explosives, which polices the Interstate Commerce Commission's Regulations on "Explosives and Other Dangerous Articles" (49 C.F.R., Parts 71-78, published originally as *Topping's Freight Tariff No. 4* and later as *Campbell's Freight Tariff No. 8*), has consistently ruled that a Napalm-filled bomb case, shipped, as here, without fuze or burster, is "not a dangerous article" subject to the Regulations and hence is "not required to be shipped in accordance with the * * * regulations" (R. 20, 21).[2]

[2] The Bureau of Explosives is a private "association," organized under the auspices of the Association of American Railroads, and consists primarily of railroads, steamship companies and explosives manufacturers (R. 19). See H. Rep. 3250, 81st Cong., 2d Sess.

The Government, claiming that the tariff rates for the shipments in question should be the fifth-class rates applicable to gasoline in steel drums or containers, paid the carriers on that basis, either originally or by deductions.[3] The carriers, asserting that the proper rates were the high, first-class rates established by Item 1820 of the Freight Classification for a complete incendiary or explosive bomb, filed these suits, in 1954, in the Court of Claims to recover the difference (R. 1, 23, 54).

The Government's answers claimed that Item 1820 is inapplicable, and that no additional sums were due respondents (R. 4, 51, 69). Respondents moved for summary judgment, relying on *Union Pacific Railroad Co.* v. *United States,* 125 C. Cls. 390, and asserting that the facts and issues in that case were identical (R. 6, 52, 70). In opposition, the Government submitted uncontroverted affidavits to show that Item 1820 did not apply, and it contended that, at the least, there was a genuine issue of material fact as to whether the articles in question—steel cases filled with Napalm gel —were "incendiary" (R. 8-22, 72-74, 75-83).

The Government also opposed the motion for summary judgment on the ground that, if the court below was of the view that Item 1820 was in terms applicable, there was then presented a question of the reasonableness of the high, first-class rates as applied to the nonhazardous shipments involved. The Government, on this aspect of the case, requested the court to suspend

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[3] All three carriers billed the Government at the higher rate. Bangor and Seaboard were originally paid for their shipments in 1944 on that basis but, on subsequent audit by the General Accounting Office, the charges were recomputed at the lower rate and the difference was deducted from the amounts due on later transportation services performed by those carriers. The Western Pacific shipments in 1948 and 1950 were originally paid for by the Government on the basis of the lower rate and not as charged by the carrier.

the proceedings and to refer that question to the Interstate Commerce Commission as the only body empowered to pass on the reasonableness of railroad tariff rates.

Finally, with particular reference to the 200 shipments moved by respondents Bangor and Seaboard in 1944, the Government showed, by other uncontroverted affidavits, that in November, 1943, before any of the shipments were tendered for transportation, the Army requested the Official Classification Committee [4] for a ruling as to the rate applicable to non-explosive and non-dangerous bomb parts, consisting of steel cases filled with Napalm gel (R. 81-82). [5] In response, the Committee, on November 23, 1943, ruled that the proposed shipments—without burster or fuze—"were not dangerous," and so should be rated by analogy as "Empty Aerial Bombs," under Item 1895 (R. 80). [6]

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[4] The Official Classification Committee is a "creation of the railroads." *Union Pacific Railroad Co.* v. *United States*, 117 C. Cls. 534, 541. It, together with the other Classification Committees, writes and publishes the Consolidated Freight Classification and assigns "classification ratings to all prospective transportable articles." *Ibid.*, at p. 542. The Committee performs these functions, pursuant to powers of attorney on file at the Interstate Commerce Commission, as attorney and agent for the various carriers, including respondents Bangor and Seaboard. For a survey of the functions of the Classification Committees, see Wilson, *Transportation and Communication* (1954) pp. 144-147; *Wiprud, Justice in Transportation* (1945) pp. 78-80; and *Western Traffic Assn.—Agreement*, 276 I.C.C. 183, 192.

[5] This request was made pursuant to the established and normal practice "for any shipper who is in doubt as to the appropriate classification rating applicable to his shipment to get in touch with the classification committee for its opinion and ruling as to the appropriate classification rating" (R. 74).

[6] The rate for Item 1895, approximating the fifth-class rate applicable to gasoline in steel drums, was about one-third of that under Item 1820. Consolidated Freight Classification No. 16, issued and effective in 1943, shows that the carload rating for Item

This committee's ruling, expressly confirmed on May 4, 1945 (R. 80), was in effect when the Army made the 200 shipments over the lines of respondents Bangor and Seaboard. Relying on this ruling, issued by the railroads' own Committee, the Government contended that respondents Bangor and Seaboard were estopped from claiming that the higher rates of Item 1820 applied to the 1944 shipments.

The Court of Claims, with two judges dissenting, adhered to its *Union Pacific* ruling, and held that Item 1820 applied (R. 84-86). In addition, while recognizing the "Government's right to have the reasonableness determined" by the Interstate Commerce Commission, the court ruled that the running of the two-year statute of limitations appearing in Section 16(3) of the Interstate Commerce Act destroyed that right (R. 84). Holding, finally, that Bangor and Seaboard were not estopped, the court granted the carriers' motions for summary judgment and entered judgments of $14,280.06 for Western Pacific, $73,056.95 for Bangor, and $28,561.93 for Seaboard (R. 85, 87, 88).

The dissent of Judge Madden, in which Chief Judge Jones joined, objected to the grant of the motions for summary judgment and to the court's refusal to "let the Government prove, if it can, that the objects in question are not incendiary" (R. 86). It states (*ibid.*) that "to name them incendiary bombs for the purpose of these tariffs is to misname them." Declaring further that the majority's opinion results from the "kind of pure literalism ha[ving] no place in the law", Judge

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1895 was 37½% of first class in the Official Classification Area, sixth class in the Southern Classification Area, and fifth class in the Western Classification Area. For all three areas, the rate applicable under Item 1820 was first class.

Madden noted that "the whole reason and justification for charging high rates for the carriage of objects is their incendiary and extra-hazardous character;" that the carriers "do not attempt to justify the high rates [demanded by them here] on the basis of high hazards;" and that, under the court's judgment, "our Government and our taxpayers are made to pay for insurance against non-existing risks, and the railroads are getting something for nothing" (*ibid.*).

SUMMARY OF ARGUMENT

I

A. In this suit for transportation charges filed by the carriers against the United States under the Tucker Act, the Court of Claims has ruled that the Government has no right to a referral of the issue of reasonableness to the Interstate Commerce Commission, if it appears that the two-year limitations period declared by Section 16(3) of the Interstate Commerce Act for suits before the Commission by shippers has expired. Carriers, the court below has regularly ruled, are not subject to the two-year limitation of Section 16(3) (although the language of that Section also covers "[a]ll actions at law by carriers * * *") when suing the United States, and may avail themselves of the six years provided by the Tucker Act. Now, this ruling is carried a step further. The same limitation which has been held to constitute no bar to the carrier's suit is held to bar the United States from obtaining consideration of one of its defenses to that suit. The practical consequence is that a carrier seeking to collect charges which are unreasonable as applied to the shipments in question may do so with impunity by waiting two years before proceeding.

The decision below is wrong whether or not one assumes that the United States would be subject to Section 16(3) in filing an independent, affirmative suit before the Commission. A corollary of the court's conclusion that it may hear the plaintiff's claim is the conclusion that it must permit full determination of the defenses thereto. And if, as here, an issue raised by way of defense is one which requires an ancillary determination by an administrative agency, then, on settled principles repeatedly enunciated by this Court, the court must stay its hand and direct a referral to the agency. The agency here involved, the Interstate Commerce Commission, has fully recognized what the Court of Claims has erroneously failed to take into account:—That an agency may act in aid of a court's jurisdiction without regard to limitations provisions which might bear upon that agency's original jurisdiction. There is nothing in the relevant statutes and history to support, no less compel, the grossly uneven result of the ruling below.

B. We believe, additionally, that the Court of Claims was incorrect in its assumption that Section 16(3) would apply to an independent suit filed by the United States with the Commission. While Section 16(3) does refer explicitly to carriers, it does not refer to the United States. And the sovereign is not subject to limitations unless Congress has clearly manifested a purpose to bind it.

II

Apart from the considerations stated under Point I, the court erred in disposing of this case on the carriers' motions for summary judgment. The Government introduced affidavits to show that the shipments in ques-

tion were not incendiary in fact and that they do not fall within the express terms and conditions of the tariff which the carriers would apply to them. The pleadings and affidavits demonstrate conclusively that there were genuine issues of material fact to be resolved. In the words of the dissenting judges, the Government was denied the right to "prove, if it can, that the objects in question are not incendiary and that to name them incendiary bombs for the purpose of these tariffs is to misname them" (R. 86).

III

With respect to respondents Bangor and Seaboard, the Government resisted the grant of summary judgment on the additional ground that these carriers were estopped from asserting that they were entitled to the high first-class rates applicable to incendiary bombs. Uncontroverted affidavits show that, before the shipments over the rails of Bangor and Seaboard were made, the Government obtained assurances from the carriers' authorized agent, the Official Classification Committee, that fifth-class rates, rather than first-class rates, would apply. Since the Government is entitled to raise the defense of estoppel against a carrier, *Oregon-Wash. R. R. Co.* v. *United States,* 255 U. S. 339, it should have been permitted to prove that the facts warranted application of that doctrine.

ARGUMENT

Introduction

The judgments of the Court of Claims rest upon the implicit assumption that the two-year period of limitations set forth in Section 16(3) of the Interstate Com-

merce Act (*supra,* p. 3) does not apply to suits to recover moneys filed by carriers against the United States.[7] Prior to 1926, the Court of Claims was of the contrary view.[8] In that year, however, it overruled its earlier decisions and concluded that, despite the inclusive terms of Section 16(3)(a), such suits against the Government are controlled by the six-year period of limitations (see 28 U.S.C. 2501) applicable generally to suits in the Court of Claims. *Southern Pac. Co.* v. *United States,* 62 C. Cls. 391. It has adhered to this position in subsequent cases, and this Court has twice declined to review the issue. *Seaboard Airline Railroad Co.* v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U.S. 848; *Union Pacific R.R. Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U.S. 930.

In the instant cases, the Government did not challenge the Court of Claims' jurisdiction; nor did it raise that issue in its petition to this Court. We nevertheless advert to the matter of jurisdiction for two independent reasons. In the first place, the court is always free to consider, of its own motion, jurisdictional

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[7] In the *Western Pacific* case, the claims accrued in 1948 and 1950 when the United States paid the lower rate rather than the amount for which it was billed. That carrier did not file suit until 1954. The shipments carried by respondents Bangor and Seaboard took place in 1944, and suit was brought approximately ten years later. The record is silent, however, as to the dates when the Government, which originally paid Bangor and Seaboard the higher rate, undertook to recoup by deductions from amounts due for later transportation service.

[8] *Schaff* v. *United States,* 59 C.Cls. 318; *Lancaster* v. *United States,* 60 C.Cls. 80. See *Central R.R. Co. of New Jersey* v. *United States,* 60 C.Cls. 578; certiorari dismissed, 270 U.S. 644; *Wabash Ry. Co.* v. *United States,* 59 C.Cls. 322, affirmed, 270 U.S. 1; *Northern Pac. Ry. Co.* v. *United States,* 59 C.Cls. 122; *Western Pac. R.R. Co.* v. *United States,* 59 C.Cls. 67, reversed on other grounds, 268 U.S. 271.

questions, and we deem it appropriate to note that the question is present, at least in the *Western Pacific* case (see note 7).[9] In the second place, we would particularly emphasize that the Court of Claims, while it has persisted in its view that the carriers are not inhibited by the Interstate Commerce Act in filing their suits against the Government, has now reached the anomalous conclusion that the Government is inhibited by that Act in making its defense to such suits.

Thus, the court below has held that the carriers are still free to bring their suits asserting underpayments by the Government, but that the Government is no longer in a position to defend the claims made against it by asserting that the charges which the carrier would impose are unreasonable and by securing a determination on that point through referral to the Interstate Commerce Commission. The Court of Claims refused to refer that issue, although it fully recognized that the matter of reasonableness was exclusively one for the Commission, because it believed that the Commission was precluded from considering the question of reasonableness by virtue of the two-year limitations period set forth in Section 16(3). This subsumes, of course, that the limitation in question may run against the United States (which we question). But entirely apart from the question whether Section 16(3) runs against the United States in *any* situation—a question which need not be reached—the result in the instant case is

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[9] Should the Court undertake to consider the question of jurisdiction, we respectfully refer it to the statements of the Government's views appearing in the *Seaboard* and the *Union Pacific* petitions (October Term, 1949, Nos. 212 and 580). Pertinent portions of those petitions are reprinted in the Appendix, *infra*, pp. 43-58. We adhere to the views there stated.

wrong. We shall argue that, irrespective of whether the United States could file an independent, affirmative claim for reparations with the Commission more than two years after the event giving rise to the claim, the Court of Claims was free to invoke the help of the Commission in aid of its own jurisdiction, and that it was bound to do so when the United States posed the issue of reasonableness by way of defense to the carriers' suits which the court has entertained.

We shall also argue that, apart from the availability of the defense of unreasonableness, the Court of Claims erred in entering summary judgments against the United States in these cases. There were other genuine issues of fact which were unresolved. These involved (1) the question whether the commodities shipped were in fact commodities of the kind covered by the first-class tariffs as written, and (2) the question whether respondents Bangor and Seaboard had taken steps which estopped them from claiming application of the first-class tariffs.

I

The Two-Year Limitation Period of Section 16 of the Interstate Commerce Act Does Not Bar the Government's Right to Have the "Reasonableness" Question Determined by the Interstate Commerce Commission

Inconsistently with its prior ruling that the two-year limitation period of Section 16(3) of the Interstate Commerce Act does not bar suits by carriers against the United States for additional transportation charges, the Court of Claims has held in these cases that the running of the same two-year period deprives the Government of its right to referral of the issue of the rates' reasonableness to the Interstate Commerce Commis-

sion, concededly the only body authorized to pass thereon. Since the Government is thus prevented from asserting the unreasonableness of the high, first-class rates as a defense, the effect of the holding below is that, at the same time that the Government is deprived of the benefit of the two-year limitation as a shield to ward off the carriers' suits, the carriers are free to invoke the provision as a sword to destroy the Government's right to establish its defense on the merits. Nothing in the Act or its history even remotely suggests a Congressional intent to achieve such a grossly uneven result. In addition, the holding below is out of line with numerous decisions of this Court which form the basis for the view, adopted by the Court of Appeals for the Eighth Circuit in *United States* v. *Kansas City Southern Railway Co.*, 217 F. 2d 763, that referrals to the Interstate Commerce Commission are not affected by the two-year limitations period.

A. *The United States Had a Right to Referral of the "Reasonableness" Issue Whether or Not the Government Is Subject to a Two-year Period of Limitations When Filing an Independent Claim with the Interstate Commerce Commission.*

It cannot be denied that if the Government could establish the unreasonableness of the high, first-class rates demanded by the carriers it would constitute a complete defense on the merits. Nor can it be questioned that the determination of such a question of reasonableness is within the exclusive province of the Interstate Commerce Commission. See, *e.g.*, *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291. The court below has itself fully recognized,

in *Union Pacific Railroad Co.* v. *United States,* 125 C. Cls. 390, involving other shipments of Napalm-filled bomb bodies, that (125 C. Cls. at 394):

> * * * [t]his [reasonableness] question is not within our jurisdiction, however, as *the question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission.* [Emphasis added.]

Similarly, a long line of decisions by this Court and the lower courts firmly establishes the need for a court to stay its hand when, in the course of litigation, there arises an issue appropriate for determination only by the Commission. Thus, in *Thompson* v. *Texas Mexican R. Co.,* 328 U.S. 134, 147, which involved a question appropriate for Commission determination, the Court declared:

> * * * in a long line of cases beginning with *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, *the court should stay its hand until the Commission has passed on the matter.* * * * *That course is singularly appropriate here.* [Emphasis added.]

Again, in a comparable case, *Tank Car Corp.* v. *Terminal Co.,* 308 U.S. 422, 433, the Court stated:

> When it appeared in the course of the litigation that an administrative problem, committed to the [Interstate Commerce] Commission, was involved,

> *the court should have stayed its hand pending the Commission's determination* of the lawfulness and reasonableness of the practice under the terms of the Act. *There should not be a dismissal, but as in Mitchell Coal Co.* v. *Pennsylvania R. Co., supra, the cause should be held pending the conclusion of an appropriate administrative proceeding.* [Emphasis added.]

Accord: *Smith* v. *Hoboken R. Co.,* 328 U.S. 123; *Mitchell Coal Co.* v. *Penna. R.R. Co.,* 230 U.S. 247, 267; *S. S. W., Inc.* v. *Air Transport Ass'n of America,* 191 F. 2d 658, 664 (C.A. D.C.); *City of New Orleans* v. *Texas & N. O. R. Co.,* 195 F. 2d 882, 887 (C.A. 5); *United States* v. *Kansas City Southern Railway Co.,* 217 F. 2d 763, 770 (C.A. 8); *Arizona Sand & Rock Co.* v. *Southern Pacific,* 280 I.C.C. 285; *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M.C.C. 337, 343; see, also, *Nathanson* v. *Labor Board,* 344 U.S. 25, 30; *United States* v. *Morgan,* 313 U.S. 409, 422.

On the basis of these settled principles, the Government, raising a question of reasonableness in the instant proceedings, moved to stay the proceedings pending a referral of the question to the Commission. The court below denied the motion, holding that Section 16(3)'s two-year "statute of limitations has run against the Government's right to have the reasonableness determined" (R. 84).[10]

The unfairness and incorrectness of this holding are

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[10] While the court's opinion does not in express terms refer to Section 16(3)'s two-year limitation period, it is plain from the four cases cited by the court on that question (R. 84-85) that the court had in mind the two-year period of Section 16(3).

manifest. Since Section 16(3), as construed by the court below, is inapplicable to suits by carriers against the United States, so that such a suit by a carrier need not be filed within the two-year period allowed by the Section, and since in such a suit the United States cannot, under the holding below, establish the defense of unreasonableness because of the expiration of that Section's two-year period, it is obvious that any carrier seeking to collect charges which are unreasonable may do so with impunity by merely waiting the two years before filing suit.

Section 16(3), on its face, applies to independent reparation proceedings, not to referral to the Commission as an incident to a judicial proceeding. Hence, nothing in the statute compels the uneven result reached by the court below. It may be suggested that the Government might protect itself, when it believes it has been charged an unreasonable rate, by promptly filing an affirmative claim for reparations with the Commission. It should be noted at the outset, however, that this would place the United States at a disadvantage as compared with other shippers. Carriers have only two years in which to bring actions to recover charges asserted against private shippers, and such shippers, in turn, have an equivalent period in which to assert their claims or defenses. Section 16. Private shippers thus need not bring anticipatory claims for reparations.

There is an even more persuasive reason for holding that the Government need not file anticipatory suits. Congress has expressly authorized the Government to invoke self-help. When audit by the General Accounting Office indicates or reveals that the United States has been overcharged by a carrier, the Government may

deduct the amount of overpayment which it finds "from any amount subsequently found to be due such carrier." 49 U.S.C. 66 (*supra*, p. 4).[11] This is the ordinary procedure which the Government follows—a procedure, incidentally, which results in the settlement of numerous controversies without the necessity of litigation. On respondents' theory, the Government could utilize this technique of recoupment only at its peril. Let us suppose (as here) that the Government believes it has been charged an unreasonable amount. Following an audit of the carrier's charges, it recoups by setoff (as, also, was done here, page 13, note 7, *supra*). On respondents' theory, the carrier may thereupon wait until more than two years have elapsed from the date that the original transportation was performed, sue in the Court of Claims on the ground that it has been underpaid, and then meet the claim that the original charges were unreasonable with the rejoinder that it is too late to determine that issue. It is indeed a remarkable notion that the United States loses a defense available to all other shippers by following a procedure adopted by Congress in order to provide an efficacious means of protecting the federal treasury.

None of the four decisions upon which the Court of Claims relied supports its holding. *Midstate Co.* v. *Penna. R. Co.*, 320 U.S. 356, and *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662, both of which involved carriers and private shippers, stand simply for the proposition that an affirmative claim for the recovery of transportation charges must be made within the period fixed by Congress and that this limitation is jurisdic-

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[11] The same Section directs the Government to make payment upon presentation of the carrier's bills.

tional. Neither case involved a question of referral to the administrative agency.[12]

The other two cases cited by the court below (*United States* v. *Director General*, 80 I.C.C. 143; *United States* v. *Southern Railway Co.*, 286 I.C.C. 203) are Commission decisions holding that the United States may not bring an *independent* proceeding for reparations after more than two years have elapsed. We question the correctness of that conclusion (see *infra*, pp. 25-27). In any event, however, the decisions do not determine the question whether a court, as an incident to a judicial proceeding brought against the United States and found to be timely filed, may refer the question of reasonableness of transportation charges to the Commission.

The basic distinction between the two situations (a distinction, as we point out below, which the Commission has recognized) is stressed in the Eighth Circuit's decision in *United States* v. *Kansas City Southern Railway Co.*, 217 F.2d 763. In that case, the Government had brought an action to recover alleged overcharges in connection with the transportation of export grain. The district court, determining that the carrier had charged the established tariff rate and that the validity of the Government's claim turned on the resolution of administrative questions, dismissed the suit. The Government thereupon filed a motion to set aside the order of dismissal and to hold the case in abeyance until the resolution of those questions could be obtained from the Commission. The motion was denied.

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[12] *Kansas City Southern R. Co.* v. *Wolf*, 261 U.S. 133, also cited by respondents, falls in the same category as the *Midstate* and the *Phillips* cases.

Accepting the district court's view as to the administrative nature of the questions involved, the Eighth Circuit vacated the dismissal and remanded the cause for such further proceedings as the district court might deem appropriate to obtain the necessary Commission determination. Stating that "[a]ny right to resort to the Interstate Commerce Commission as a matter of independent and plenary proceeding clearly would now be wholly barred [by limitations]," the court observed that only by holding the action in abeyance and submitting the administrative questions to the Commission would the public treasury be protected (217 F. 2d at 769). In denying a petition for rehearing, the Eighth Circuit again emphasized the propriety of a referral after the limitations period had run, stating (217 F. 2d at 770) that this circumstance

> * * * had left the situation where the Interstate Commerce Commission now was without any power under the statute to grant reparation relief in an administrative proceeding, and that the only way therefore that it presently was possible to safeguard such public interest as might be involved would be "by a holding of the present action in abeyance and allowing the administrative questions to be submitted to the Interstate Commerce Commission for answer, on the basis of their incidence in the judicial proceeding." [13]

The approach adopted by the Eighth Circuit avoids the gross unfairness of the result reached by the court

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[13] See also *Northern Pacific Ry. Co.* v. *United States*, 213 F.2d 366 (C.A. 8). It is significant that in that case, where the two-year period provided in Section 16(3) had also run, the court of appeals, *sua sponte*, directed a referral.

below and gives concrete meaning to the precept that courts and administrative agencies are designed to serve as "collaborative instrumentalities of justice." *United States* v. *Ruzicka*, 329 U. S. 287, 295; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 620-622.[14]

While the Court of Claims has followed the Interstate Commerce Commission's view that Section 16(3) applies to affirmative claims for reparations filed by the United States, it has ignored the distinction, which the Commission itself has drawn, between an administrative agency's original jurisdiction and its capacity to make a determination in aid of the courts. In States District Court for the District of Arizona to *Arizona Sand & Rock Co.* v. *Southern Pacific*, 280 I.C.C. 285, the carrier instituted suit in the United collect demurrage charges on shipments of cement. The shipper contended that the tariff provisions relied upon were inapplicable and that the charges were unreasonable. By order of the court, the proceedings were stayed to permit a determination by the Commission. The matter was thereupon referred to the Commission, where the carrier interposed the defense that the limitations period fixed by Section 16 had run as to some of the services in controversy. The Commission agreed that the period had run but rejected the defense, noting that "it is the practice of the Com-

[14] As the instant litigation illustrates, there is particular need for such collaboration in transportation cases. Not infrequently, a shipper will defend a carrier suit on two or more grounds, raising issues which are judicial questions (*e.g.*, the meaning and application of a tariff) and other issues (*e.g.*, the reasonableness of the rate determined to be applicable) which are administrative in character. Or a shipper may sue for damages in the district court (see Interstate Commerce Act, Section 9, 49 U.S.C. 9) raising both judicial and administrative questions.

mission to assist the court in instances of the kind stated in [its] order" and that "[a]ppropriate findings and a declaratory order in proceedings such as this are authorized by section 5(d) of the Administrative Procedure Act" (280 I.C.C. at 286). Accordingly, the Commission passed upon all of the questions posed by the court's order, made the appropriate determinations, and transmitted a certified copy of its report to the district court for the latter's guidance. The same procedure was available here. We submit that it should have been followed.

Respondents contend (Brief in Opposition, p. 9) that the *Arizona Sand & Rock Co.* case is unsound, as demonstrated by this Court's decision in *Montana-Dakota Co.* v. *Pub. Serv. Co.*, 341 U.S. 246. This is not so. The reason for the Court's refusal, in *Montana-Dakota*, to refer an issue of reasonableness (raised there by the plaintiff) to the Federal Power Commission was that the complaint was not deemed to state "a federally cognizable cause of action" (p. 253). And that was held to be so because the Federal Power Act, unlike the Interstate Commerce Act, makes no provision for awarding reparations or damages to victims of unreasonable or unlawful rates, but provides only prospective remedies. It should be noted that the four dissenters in *Montana-Dakota* agreed that the Power Act "does not afford to the Commission the authority conferred on administrative agencies under other regulatory statutes to award damages to those injured by violations of the Act" (p. 260). It was their view, however, that it was within the general powers of the district court, in the circumstances of the particular case, to impose civil liability even though the Federal Power Act expressed no remedy.

Here, of course, the shipper is given a statutory remedy for unreasonable charges or other damages suffered. See Interstate Commerce Act, Section 9, 49 U.S.C. 9. And the question is whether the carrier which asserts a right to sue the United States for transportation charges free from the limitations restrictions imposed by Section 16 of the Interstate Commerce Act may rely on that very Section to defeat consideration of the defense that the charges which the carrier would impose are unreasonable.

B. *The United States Is Not, in Any Event, Subject to the Limitations Provisions of Section 16(3)*

In the preceding section of this brief, we have assumed that the United States would be subject to a two-year period of limitations in filing an independent claim with the Commission, and we have urged that, even on that assumption, there is no obstacle to the referral which the Government sought. Here, we shall point out that the assumption is unsound.[15] If we are correct on either branch of the argument, it follows, of course, that the Court of Claims erred in its conclusion that a referral should not be directed.

There is no expression in Section 16 indicating that the limitations provisions there set forth shall run against the sovereign. And "[i]t is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the

[15] As indicated *supra*, page 21, the holdings of the Interstate Commerce Commission on this point are contrary to the Government's position.

United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." *United States* v. *Nashville &c. Ry. Co.*, 118 U.S. 120 125. See, also, *United States* v. *Summerlin*, 310 U.S. 414, 416; *Board of Commissioners* v. *United States*, 308 U.S. 343, 351; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126;[16] *Davis* v. *Corona Coal Co.*, 265 U.S. 219, 222-223; *DuPont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 461-462; *United States* v. *Whited & Wheless*, 246 U.S. 552, 561-562.

DuPont de Nemour & Co. v. *Davis, supra*, is of particular significance because of its closeness to the situation presented here. That case involved a suit by the Director General of Railroads against a shipper for demurrage charges accruing during the period of federal control of the railroads. The shipper sought to defend on the ground that the claim was barred by the limitations provision of Section 16(2). Rejecting this defense, the Court stated (264 U.S. at 462):

> In taking over and operating the railroad systems of the country the United States did so in its

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[16] In the *Guaranty Trust* case, Justice Stone, speaking for a unanimous Court, stated (pp. 132-133). "Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. * * * So complete has been its acceptance that the implied immunity of the domestic 'sovereign,' state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included; and to the Conformity Act."

> sovereign capacity, as a war measure "under a right in the nature of eminent domain," * * * and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during federal control, as we have seen, are the property of the United States. * * * An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in the governmental capacity, * * * and, therefore, is subject to no time limitations, in the absence of congressional enactment clearly imposing it. * * * Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government. * * *

We find no basis for suggesting that the United States, as a carrier, is unaffected by limitations provisions but that it is subject to such provisions in its capacity as a shipper. In both situations the controlling question is whether there is a clear manifestation of Congressional purpose to bar the Government. There is no such manifestation in Section 16(3), as it now reads, any more than there was when this Court decided *Du Pont de Nemours & Co.* v. *Davis.*

II

The Court Below Erred in Holding that, as a Matter of Law, the High First-Class Tariff Rates Apply to the Shipments Involved

Quite apart from its action in precluding consideration of the Government's claim that application of the first-class rates would result in unreasonable charges, the Court of Claims erred, we believe, in

entering summary judgment over the claim of the Government that it could show that the first-class rates are inapplicable because steel bomb casings filled with Napalm gel are not, as a matter of fact, "incendiary bombs." Summary judgment may be granted only where the movant is entitled to judgment as a matter of law (Court of Claims Rule 51(d); F.R.C.P. Rule 56(c); *Seaboard Surety Co.* v. *Racine Screw Co.*, 203 F. 2d 532, 534 (C.A. 7)); it must be denied where there is a conflict as to some material fact (Court of Claims Rule 51(d); F.R.C.P. Rule 56(c); *Campana Corp.* v. *Harrison*, 135 F. 2d 334 (C.A. 7); *Slagle* v. *United States*, 228 F. 2d 673 (C.A. 5)).[17] Here, the record reveals a sharp conflict as to whether in fact the steel bomb casings filled with Napalm gel constituted "incendiary bombs" within Item 1820.

In opposition to the carriers' motions for summary judgment, the Government filed affidavits demonstrating that there were genuine issues of material fact.

The affidavit of Bernard F. Fay, a chemical engineer with thirty years' experience in "explosives, combus-

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[17] The question to be decided on "a motion for summary judgment" is only "whether or not there is a genuine issue of fact, and not how that issue should be determined." *Gifford* v. *Travelers Protective Ass'n*, 153 F. 2d 209, 211 (C.A. 9); *Ramsouer* v. *Midland Valley R. Co.*, 135 F. 2d 101 (C.A. 8); cf. *Fountain* v. *Filson*, 336 U. S. 681; *Vale* v. *Bonnett*, 191 F. 2d 334 (C.A.D.C.); *Chappell* v. *Goltsman*, 186 F. 2d 215, 218 (C.A. 5). And, because the summary-judgment procedure is an extreme remedy and results in a denial of the benefit of a trial on the merits, all "doubts as to the existence of a genuine issue should be resolved" against the movant, who has "the burden of showing the absence of a genuine issue of material fact." *Assets Service Corp.* v. *United States*, 121 C. Cls. 308, 312; *Union Transfer Co.* v. *Riss & Co.*, 218 F. 2d 553, 554 (C.A. 8). See *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620; *Traylor* v. *Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213, 216 (C.A. 8).

tion and metallurgy," shows that he would testify that Napalm gel in a bomb body "is not incendiary" (R. 8). Dr. Leo Finkelstein, a chemical engineer with over forty years' experience whose duties include research in incendiaries and smoke, also states unequivocally that a Napalm-filled bomb body "is not incendiary" (R. 10). Dr. Homer Carhart, Head of the Fuels Branch, Chemistry Division, Naval Research Laboratory, takes the same position. His affidavit points out that "Napalm gel itself is not incendiary, since it is not capable of spontaneous combustion," and that "Napalm gel is not different from rubber cement which is also used as a component of incendiary bombs but which itself is not incendiary" (R. 12). Similarly, Dr. Sidney Magram, Branch Chief of the Incendiary and Aerosol Branch at the Army Chemical Center, expressly concurs in the view that Napalm-filled bomb bodies, without the burster and the fuse, are "not incendiary" (R. 13).

Professor Walter H. Bauer, Head of the Physical Chemistry Division of Rensselaer Polytechnic Institute's Chemistry Department, has been engaged since 1941 in the development of Napalm and similar products (R. 75). In concurring in the view that Napalm gel is not incendiary, his affidavit states (R. 76, 77):

> * * * Napalm gel which is used in filling bombs are mixtures of non-inflammable material consisting of mixed aluminum soaps and combustible liquids such as gasoline. * * *
>
> *Napalm gel in bombs does not have any incendiary qualities* * * *.
>
> In summary, the *napalm content of napalm gel is not incendiary.* [Emphasis added.]

This is also the view of Dr. Robert W. Van Dolah, the Chief of the Division of Explosives Technology in the Bureau of Mines and the Head of the Chemical Division of the Naval Ordnance Test Station from 1946-1954. Dr. Van Dolah's affidavit points out (R. 79):

> VIII. That napalm gel in itself is not an incendiary.
>
> IX. That napalm gel is merely a gelled mixture of hydrocarbons.
>
> X. That napalm gel has no incendiary characteristics and is not capable of self-ignition or spontaneous combustion.
>
> XI. That a container of napalm gel need not be handled differently from a container of gasoline in the interests of safety and is not considered as incendiary.

Respondents, on the other hand, assert that Napalm is an incendiary gel and that the shipments involved in this litigation accordingly consisted of steel cases "filled with incendiary gels." Brief in Opposition, pp. 3, 11. Plainly, these diametrically opposed claims by the respondents and the Government as to the nature and characteristics of Napalm gel present an issue of fact.

This disputed fact, *i.e.*, whether a steel case filled with Napalm gel is an incendiary bomb, is critical to applicability of Item 1820. Item 1820 is entitled "Bombs or mines" and is one of twelve different subdivisions indented and listed under Item 1800's general description of "AMMUNITION, Explosive, Incendiary or Gas, Smoke or Tear Producing, see Note 1, item 1805."[18]

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[18] The provisions of Consolidated Freight Classification Number 17, as set forth in Item 1800 and its subdivisions (Items 1810 to

Obviously, any of the twelve specific items falling under Item 1800 must conform, at the minimum, to that general description.

This general description sets up three requirements, each of which must be met before an article falls within the general category or its specific subdivisions. First, the article must be ammunition. Assuming for the present that the bomb cases here constitute ammunition,[19] Item 1820 goes on to require, as the second con-

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1865), and the carload ratings applicable to each subdivision are as follows:

Item	Articles	Carload Ratings
1800	AMMUNITION, Explosive, Incendiary or Gas, Smoke or Tear Producing, see Note 1, item 1805:	
1805	Note 1.—Subject to Rule 39, except that Section 16, page 58, of Agent H. A. Campbell's Tariff I.C.C. No. 4, in so far as it authorizes shipments to be made in accordance with regulations of the War and Navy Departments shall be applicable only to CL shipments.	
1810	Ammunition, fixed, for cannon, with empty, sand-loaded or solid projectile, loose or in packages....	4
1818	Ammunition, fixed, noibn, for cannon, loose or in packages	1
1820	Bombs or mines, loose or in packages.....	1
1825	Boosters or detonating fuzes, loose or in packages..	1
1830	Cartridge cases (catridge shells), cannon, empty, primed, loose or in packages	3
1835	Cartridges, cannon, blank, loose or in packages....	4
1840	Cartridges, small arms, blank or loaded, noibn, in boxes	4-5
1845	Fuzes, combination percussion, tracer or time, loose or in packages	3
1850	Grenades, hand or rifle, loose or in packages.....	1
1855	Percussion caps, in boxes	3
1860	Primers, cannon or smal larms, in boxes	1
1865	Projectiles, for cannon, loose or in packages	1

[19] Should the cases be remanded to the Court of Claims, we are prepared to show that bomb cases with Napalm gel are not in fact ammunition.

dition of its applicability, that the article be either explosive, incendiary, gas, smoke, or tear-producing. If the bomb cases with Napalm gel are not incendiary, as the Government affidavits show, concededly they do not fall under Item 1820.[20]

Finally, by reference to Note 1, the general category is expressly made "subject to Rule 39." See note 18, pp. 30-31. That Rule, in turn, incorporates the Interstate Commerce Commission Regulations on "Explosives and Other Dangerous Articles" (49 C.F.R., Parts 71-78, originally published as *Topping's Freight Tariff No. 4* and later as *Campbell's Freight Tariff No. 8*). (R. 18.) The conclusion that an article does not fall under Item 1800 or its subdivisions unless it is "subject to" these Regulations is supported by unchallenged affidavits, presented to the court below in opposition to respondents' motions for summary judgment. Thus, the affidavit of Russell B. Amick, whose official duties over the past thirty-five years have required "constant use and application of tariffs issued by common carriers," declares that "by reason of the reference in that item to Note 1," Item 1800 is limited in application to those items "which are subject to the rules and regulations published in Agent W. S. Topping's Tariff No. 4, I.C.C. No. 4," *i.e.*, the Interstate Commerce Commission Regulations on "Explosives and Other Dangerous Articles," 49 C.F.R., Parts 71-78 (R. 15). Similarly, A. S. Dolch, whose rate transportation experience spans a period of fifty years and includes reissuance of freight tariffs, states in his affidavit that,

> * * * in order for an article to be rated under Item 1800 or any of its specific twelve subdivisions

[20] Respondents have never suggested any other basis for rating the articles first-class. See Brief in Opposition, p. 11 *et seq.*

(Items 1810 through 1865) it must be an article which itself is subject to regulation under Topping's Tariff I.C.C. No. 4 These regulations are promulgated by the Interstate Commerce Commission and are published in the Code of Federal Regulations at 49 C.F.R., Parts 71-78. [R. 18-19.][21]

Uncontroverted affidavits show that Napalm-filled bomb bodies, unlike such items as primers, grenades, boosters, fixed ammunition (see note 18), are *not* subject to the Regulation. T. C. George is Assistant Chief Inspector of the Bureau of Explosives,[22] which enforces the Regulations. His affidavit points out that a Napalm-filled bomb body, shipped, as in the instant case, without fuze or burster, is "not a dangerous article or an explosive article" subject to the Regulations and hence is "not required to be shipped in accordance with the Interstate Commerce Commission Regulations governing the shipment of explosives and other dangerous articles" (R. 20-21).

That Napalm gel is not subject to the Regulations on "Explosives and Other Dangerous Articles" is significant for an additional reason. Obviously, it is the relatively non-hazardous nature of Napalm gel which frees

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[21] This reading of Item 1800 is supported still further by the fact that each of the twelve specific items listed in Items 1810 through 1865—*e.g.*, primers, grenades, boosters, fixed ammunition—*is actually* subject to the Regulations. (Compare those twelve items with their respective counterparts listed in Section 72.5 of the Regulations on "Explosives and Other Dangerous Articles.") (49 C.F.R. 72.5.) Even without resort to the rule calling for strict construction of the tariff against the carriers who prepared it, this makes doubly clear the need for requiring coverage under the Regulations as a condition precedent to invoking the Item 1800 series classification.

[22] The Bureau is a private, non-governmental organization. Its "finances are administered by the Association of American Railroads" (R. 19); see page 6, note 2.

it from the strict packing, marking, loading, and handling requirements imposed by the Regulations.[23] It is equally clear that the high first-class rates applicable to explosives and other dangerous articles under Item 1820 find their justification in the fact that the transportation of such articles is "attended with great risk," that "heavy expenses are incurred [by the carriers] in conforming to [the I.C.C.] regulations," and that the "first class" rate is therefore the proper rate "to apply on this traffic." *Rates on Powder and High Explosives,* 151 I.C.C. 155, 163; *Austin Powder Co.* v. *Wheeling & L.E. Ry. Co.,* 156 I.C.C. 334, 337; *Du Pont de Nemours & Co.* v. *B. & O. R.R. Co.,* 128 I.C.C. 705, 706. Here, application of the first-class rates forces the Government to reimburse the carriers for risks and expenses they do not incur. As Judge Madden's dissent observes, "our Government and our taxpayers are made to pay for insurance against non-existent risks, and the

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[23] It is, of course, the degree of hazard involved which accounts for the variation of ratings assigned to the twelve subdivisions under Item 1800. Thus, the very high first-class rating of Item 1820—which respondents seek to apply here—is shared only by such extremely dangerous articles as fixed ammunition for cannon (Item 1815), boosters or detonating fuzes (Item 1825), grenades (Item 1850), and cannon projectiles (Item 1865). See page 31, note 18. Less explosive and less dangerous commodities, such as percussion caps (Item 1855), are assigned a third-class rating, while the least explosive and hazardous ammunition, such as small arms cartridges (Item 1840), are rated fourth or fifth class. *Id.* It is clear from these variations in assigned ratings that they correspond to the relative degree of explosiveness or danger involved. It is also clear that the crucial identifying character of the type of "bomb" contemplated by Item 1820 is its explosive and hazardous nature, a characteristic which the steel bomb cases here did not possess.

Note, also, the Court of Claims' opinion holding that Napalm must be classified as "soap powder" for freight-rate purposes. *Union Pacific Railroad Co.* v. *United States,* 117 C. Cls. 757.

railroads are getting something for nothing" (R. 86). While this consideration goes to the issue of reasonableness, it is also relevant to the question of tariff interpretation, for, like any other instrument, a tariff is to be read in the light of its known purposes and in a manner which avoids unnecessary and gross unfairness.[24]

In summary, it seems clear that the Government is entitled to adduce evidence to show that the commodity in question does not fall within the terms of the tariff which the carriers would apply, and to show further that related interpretations and practices, as well as simple considerations of fairness, support this view. We do not argue that this Court need resolve the question of tariff interpretation. We do contend that the Government's answer and the numerous affidavits which it filed in opposition to the carriers' motions for summary judgment show that there were genuine issues of fact to be resolved. And we urge that the Court exercise its supervisory powers to assure the Government its day in court on those issues. It has the right, in Judge Madden's words, to "prove, if it can, that the objects in question are not incendiary and that to name them incendiary bombs for the purpose of these tariffs is to misname them" (R. 86).

III

The Court of Claims Erroneously Denied the Government Its Right to Determination of the Issue of Estoppel

As to respondents Bangor and Seaboard, the Government further contended, in opposition to the granting

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[24] Compare the Court of Claims' statements in *Union Pacific Railroad Co.* v. *United States*, 117 C. Cls. 757, 764; 125 C. Cls. 390, 393-394.

of summary judgment, that they were estopped from claiming that the high first-class tariff rates of Item 1820 applied to the 200 shipments carried over their lines in 1944. The Court of Claims ruled, however, that there was no estoppel, stating that "we do not see how the [Government] could reasonably have been misled or injured by the ruling, especially when the [carriers] promptly billed the [Government] at the first-class rate and the [Government] paid that rate and continued to make the shipments at that rate" (R. 85). But here, as on the classification issue (Point II), disposition turned upon questions of material fact, which, under settled principles, required the denial of summary judgment.

In the court below, the Government undertook to show that in November 1943, before tender of the 200 shipments, the Official Classification Committee, at the Army's request, issued a ruling as to the appropriate transportation rate;[25] that the ruling rejected the high first-class rate of Item 1820 and, on the ground that the shipments were not dangerous, declared rates approximating fifth class to be applicable; that, following this ruling, the Army made the 200 shipments in question; and that the ruling was in effect during the entire period that these shipments took place and was expressly confirmed on May 4, 1945. See R. 80.

Assuming these facts, we believe that respondents are estopped from asserting that they are entitled to transportation charges in excess of those quoted by their agent, the Classification Committee. All of the

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[25] The Classification Committee is a "creation of the railroads" and acts as attorney and agent for the various carriers, including respondents Bangor and Seaboard. See page 8, note 4.

elements of a classic estoppel appear to be present: (1) a ruling and representation by the Committee, acting on behalf of the carriers; (2) expectation by the Committee that the shipper would rely thereon; (3) numerous shipments by the Army over respondents' lines during 1944, while the ruling was in full effect; and (4) detriment to the Army, because it could have used other shipping procedures or other means of transportation had it not been led to believe that the rail shipments would move at the lower rate available under Item 1895, rather than the high first-class rate of Item 1820.[26] See 3 Pomeroy, *Equity Jurisprudence* (5th ed. 1941), Sec. 805, and cases cited.

It is true, as pointed out by the Court of Claims (R. 85), that a private shipper in interstate commerce cannot invoke the defense of estoppel to prevent a carrier which has quoted a lower rate from collecting a higher rate prescribed in the applicable tariff.[27] This follows

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[26] The statement below that the Government could not "reasonably have been misled or injured by the ruling" is without support in the record and purely speculation. Had the Army been advised, before the 1944 shipments, that the railroads expected to charge the Item 1820 rate, the Army could have given consideration to breaking the shipments into their component parts by shipping the steel cases and Napalm gel separately, thus obtaining the benefit of the low fifth-class rates concededly applicable to each of the component parts. A similar shipping procedure is now utilized by the Army. The record shows that the Chemical Corps has regularly shipped "napalm thickener * * * separate and apart from the bomb body" of fire bombs (gasoline-tank type) (R. 72).

Moreover, had the Army been so advised before 1944, it could also have considered moving the Napalm-filled bomb bodies by motor carrier, rather than rail, so as to obtain a lower transportation rate.

[27] We assume, *arguendo*, at this point, that the high first-class rates of Item 1820 may correctly and reasonably be applied to the shipments.

from the fact that Section 6 (7) of the Interstate Commerce Act (49 U.S.C. 6(7)) forbids departures from the rates established by the carriers' published tariffs.[28] Were the rule otherwise, estoppel could "become the means of successfully avoiding the requirement of the Act as to equal rates * * *." *Pittsburgh, &c. Ry. Co.* v. *Fink*, 250 U.S. 577, 583; *N. Y. Cent. R.R.* v. *York & Witney Co.*, 256 U.S. 406; *L. & N. R.R.* v. *Central Iron Co.*, 265 U.S. 59, 65; *Illinois Steel Co.* v. *B. & O. R. Co.*, 320 U.S. 508, 513.

But this rule, resting as it does upon the statutory policy of preventing one private shipper from gaining competitive advantage over another, has no application to the situation where a differentiation between shippers is permitted by statute. Section 22 of the Act states (49 U.S.C. 22):

> Nothing in this [chapter] shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States * * *.

It declares a specific policy which supersedes, *pro tanto*, the general policy of Section 6(7) against discrimination in rates. There is accordingly no basis for extending to Government shipments the general policy against rate concessions. By the same token, there is no justification for permitting the carrier to avoid the effect of its concessions.

The holdings of this Court are conclusive, we believe,

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[28] Section 6(7) provides, in pertinent part: "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified * * *."

on the proposition that the Government may invoke the defense of estoppel against a carrier. In *Oregon-Wash. R.R. Co.* v. *United States,* 255 U.S. 339, the railroad transported the baggage and personal effects of Army officers transferred to new stations. The railroad was paid by the Government at reduced "land-grant" rates, in the belief that the baggage transported was covered by "land-grant equalization agreements" between the railroad and the Government, providing for such reduced rates for Government property. It then became settled by a court decision that the baggage, not being owned by the Government, was not covered by the agreements and was covered by the higher commercial tariff rate. The railroad sued to recover the difference between the higher rate and the rate actually charged. This Court denied recovery, holding that the railroad was estopped from claiming the higher rate.

This decision was handed down together with *Western Pac. R.R. Co.* v. *United States,* 255 U.S. 349, where the Court made explicit its view that Section 22, allowing preferred rates for the Government, destroys the basic premise on which a private shipper is denied the right to invoke the defense of estoppel. The facts in that case paralleled those in *Oregon-Wash.* In holding that the railroad had waived its right to claim the rate fixed by the tariff, this Court said (255 U.S. at 355-356):

> A contention, however, is made that was not made in [the *Oregon-Washington* case], that is, that "under the Interstate Commerce Law the final carrier [respondents were final carriers of the transportation with which this case is concerned] is not only empowered to collect the through charge,

but is burdened with the duty and obligation of collecting the full published tariff rate and is powerless to relieve or release a shipper or consignee from any part of the same."

The further contention is that within this obligation is the property in the pending case. The immediate answer is that § 22 of the Interstate Commerce Act permits reduced rates to the United States, and that by Conference Ruling of the Interstate Commerce Commission No. 33 of February 3, 1908, § 22 is made applicable to property transported for the United States. The transportation in the present case was for the Government, and in providing for it and paying for it the Government performed a governmental service.

Moreover, the Government's right to invoke estoppel was not forfeited, as the court below ruled (R. 85), because the Government paid the carriers' bills as rendered. Congress has directed the Government to pay transportation bills on presentation (49 U.S.C. 66, *supra,* page 4). At the same time, as a necessary protective measure, the statute reserves to the Government the right to deduct any overpayment from amounts subsequently found to be due the carrier. Thus, the section "provides for *prompt payment* to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States and includes a provision for deduction of overpayments." H. Rep. No. 1217 on S. 2009, 76th Cong., 1st Sess., p. 28 (emphasis added).[29] This right to deduct

[29] The Section represents the full recognition of the legitimate interests of both the carriers and the public treasury. On the one hand, the carrier receives almost immediately those sums, the pay-

for overpayment was exercised by the Government in the *Bangor* and the *Seaboard* cases. See page 7, note 3.

The Court of Claims' view that prompt payment deprives the Government of its right to invoke estoppel against the carrier can hardly be squared with the Congressional mandate that the carrier's bills be paid promptly on presentation. In view of the statutory requirement, the Government, even if overcharged, has no choice but to make prompt payment. In these circumstances, prompt payment without interposing any objection can be taken to mean no more than that the Government is complying with the statutory directive and that, at the same time, it is reserving its rights to claim, on a later audit, that it has been overcharged. To the extent that it makes the prompt payment result in a forfeiture of the Government's right to claim an overcharge, the opinion below incorrectly strips the Government of the post-audit protection expressly reserved to it.[30]

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ment of which formerly had to await completion of a prepayment audit. On the other hand, should the carrier in the process obtain a payment later determined by the General Accounting Office to be invalid or incorrect in amount, it must promptly refund or the Government will deduct the overpayment from amounts due the carrier on later transportation services.

[30] The opinion below also refers to a supposed concession by the Government in an earlier Napalm gel case. *Union Pacific Railroad Co.* v. *United States*, 125 C. Cls. 390. There, the court's opinion states, the Government admitted that the Official Classification Committee had erred in ruling "a lower rate than Item 1820" applied (R. 85).

The Government did concede in the *Union Pacific* case that the articles could not be rated as *empty* bombs, because they were in fact Napalm-filled. And we also recognize that there was testimony in that case to the effect that the Official Classification Committee had attempted to repudiate its earlier ruling that the low fifth-class rates were applicable. But it does not follow, we submit, that the Government admitted that the Committee erred in

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the cause remanded with directions which will permit a full presentation of the petitioner's defenses.

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AUGUST, 1956.

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ruling that the fifth-class rates applied. To the contrary, since a steel bomb body is rated fifth class and since Napalm itself, as the Court of Claims has ruled, is ratable fifth class, the Government's consistent position in all of these cases has been that the entire or combined shipment, consisting of the bomb body filled with Napalm, should also be rated fifth class and not first class under Item 1820. See *Union Pacific Railroad Co.* v. *United States*, 117 C. Cls. 757.

APPENDIX

1. Excerpts from the Government's petition for a writ of certiorari in *United States* v. *Seaboard Airline Railroad Company,* October Term, 1949, No. 212, pp. 5-16.

* * * * *

REASONS FOR GRANTING THE WRIT

As construed by the Court of Claims, 28 U.S.C. 2501, which limits that court's jurisdiction to claims sued upon within six years of accrual, deprives the Government of the benefit of Section 16(3)(a) of the Interstate Commerce Act, which specifically bars actions to recover charges by carriers subject to the Act unless brought within two years. We submit that this result not only flouts the unequivocal language of Section 16(3) (a), but is also wholly inconsistent with the decisions of this Court in *Midstate Co.* v. *Penna. R. Co.,* 320 U.S. 356 (interpreting Section 16(3)(a)) and in *United States* v. *A. S. Kreider Co.,* 313 U.S. 443 (interpreting 28 U.S.C. 2401(a), the counterpart for district court suits of 28 U.S.C. 2501).

1. The inclusive and unambiguous language of Section 16(3)(a), applying, without exception, to "All actions at law by carriers * * * for recovery of their charges," provides no warrant for excepting suits against the Government. Nor does the Court of Claims seek to justify its exclusion of the United States from the protection of this statute on the ground that the statutory terms direct such an exclusion. Indeed, in a series of decisions prior to 1926, that court expressly recognized that "the statute does apply to suits by carriers against the Government" (*Schaff* v. *United States,* 59 C. Cls. 318, 321-322), and held that it barred these suits when not brought within the prescribed period. *Lancaster* v. *United States,* 60 C. Cls. 80. See *Central R.R. Co. of New Jersey* v. *United States,* 60 C. Cls. 578, certiorari dismissed, 270 U.S. 644; *Wabash*

Ry. Co. v. *United States*, 59 C. Cls. 322, affirmed, 270 U.S. 1; *Northern Pac. Ry. Co.* v. *United States*, 59 C. Cls. 122; *Western Pac. R.R. Co.* v. *United States*, 59 C. Cls. 67, reversed on other grounds, 268 U.S. 271.

Then, in *Southern Pac. Co.* v. *United States*, 62 C. Cls. 391 (1926), where the question was scarcely touched upon in the briefs,[2] the Court of Claims overruled this line of cases, holding that, despite the inclusive terms of Section 16(3)(a), suits by carriers against the Government were to be ruled by the six-year jurisdictional statute of limitations (now 28 U.S.C. 2501) applicable to all suits in the Court of Claims. In creating this exception, the court neglected to emphasize, as it had formerly, the clear and all-embracing language Congress had chosen. Instead of recognizing at the outset that "no single argument has more weight in statutory interpretation" than the fact that the statutory language covers the case at hand (*Browder* v. *United States*, 312 U.S. 335, 338), the court adopted as a major premise the principle that repeals by implication are disfavored, and reasoned therefrom that the absence in Section 16(3)(a) of language *expressly applicable to suits in the Court of Claims* was a significant argument for its inapplicability. It is submitted that the court's major premise was irrelevant to the problem before it, and that it erred in its conclusion because of its erroneous choice of a starting-point for its inquiry.[3]

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[2] Apart from the fact that the Court of Claims had already decided this point favorably to the Government, there were then pending in this Court two cases in which it was hoped this question would be finally resolved. But this Court held that Section 16(3) did not apply retroactively and found it unnecessary to decide the question here presented. *United States* v. *St. Louis, S. F. & T. Ry. Co.*, 270 U. S. 1 (Jan. 18, 1926).

[3] Since the court below rests the instant decision upon the reasoning in *Southern Pac. Co.* v. *United States*, *supra*, the discussion here focuses on the arguments adduced in that opinion.

Judicial reluctance to find statutory repeals by implication is limited by the well-defined principle that a statute applicable to a specific class of cases will, within that class, supersede a more general statute. *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107; *Shelton* v. *United States*, 165 F. 2d 241 (C.A.D.C.). This principle precisely relevant here, has operated to bar suits against the Government brought within the six-year jurisdictional limitation period but not within the lesser period prescribed for the cause of action under a specific statute. *United States* v. *A. S. Kreder Co.*, 313 U. S. 443 (five years, under Revenue Act of 1926, § 113(a), 44 Stat. 9, 116); *Christie-Street Commission Co.* v. *United States*, 136 Fed. 326 (C.A. 8) (two years, under R.S. 3227, 26 U.S.C. 3772); *Kahn* v. *United States*, 55 C. Cls. 271, affirmed, 257 U. S. 244 (same); *Fort Pitt Gas Co.* v. *Unted States*, 49 C. Cls. 224 (same); cf. *Mejia* v. *United States*, 152 F. 2d 686 (C.A. 5), certiorari denied, 328 U. S. 862 (one year, Louisiana wrongful death statute). In *United States* v. *A. S. Kreider Co., supra*, referring to the provision in § 24(20) of the Judicial Code (now 28 U.S.C. 2401(a)), fixing for Tucker Act suits in the district courts the same general six-year limitation applicable in the Court of Claims, this Court said (313 U. S. at 447):

> We think the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24(20). Clearly, nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions even though they are brought under § 24(20). Phrasing the condition negatively, Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment.

Earlier, employing an identical analysis, the Court of Claims had reached similar results. *Kahn* v. *United States, supra,* at 286; *Fort Pitt Gas Co.* v. *United States, supra,* at 234.

The Court of Claims has sought to distinguish its decision in the *Fort Pitt Gas Co.* case by pointing out that the two-year statute of limitations there involved contained the words "in any court," that it therefore indicated "a clear intention to prescribe a definite limitation in all courts." *Southern Pac. Co.* v. *United States,* 62 C. Cls. 391, 398. We submit that this purported distinction is wholly without merit. The reach of Section 16(3)(a) extends to "all actions at law". It is difficult to conceive how these terms, in their present context, can be regarded as less inclusive than "actions * * * in any court." The suggestion that Section 16(3)(a) does not cover actions in the Court of Claims because it does not refer to "any court" could presumably be invoked by every state court whose statute of limitations it supersedes. To state this possibility is to reject it, and to reject along with it the corresponding argument of the court below.

Beginning with the erroneous assumption that to bar suits against the Government under Section 16(3)(a), the plain language of which directed such a result, would effect an impermissible "repeal by implication" of the statute restricting jurisdiction of the Court of Claims to actions brought within six years, the court below was led to attribute to other portions of the Interstate Commerce Act a significance opposite from that which would seem appropriate. The court observed that the Act provides for two exceptions with respect to Government transportation: 49 U.S.C. 22, permitting carriers to provide such transportation free or at reduced rates; and 49 U.S.C. 3(2), permitting extension of credit to the Government without authorization by

the I.C.C.[4] From these exceptions, which Congress knew how to make expressly when it desired special treatment for Government transportation, the court below drew the inference that the Government was intended to be excepted from the operation of Section 16(3)(a), where Congress made no exception of any kind.

The error in this reasoning is, we submit, readily apparent. The express exceptions for government transportation in unrelated portions of the Interstate Commerce Act, are, at the very least, irrelevant to the question whether Section 16(3)(a) applies to suits against the United States. If anything, these explicit exceptions would support the contrary conclusion that none were to be implied elsewhere in the Act.[5]

2. It is submitted that the Court of Claims, in *Southern Pac. Co.* v. *United States,* 62 C. Cls. 391, 399, 403, committed the fallacy referred to by this Court in *Mid-*

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[4] Whatever weight might conceivably have been attributed prior to 1940 to the provision permitting extension of credit to the Government would have disappeared with the congressional directive that payment for government transportation "shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office." Transportataion Act of 1940, Title III, Part II, § 322, 54 Stat. 955, 49 U.S.C. 66.

[5] This latter conclusion has been adopted by the Interstate Commerce Commission, the repeated recommendations of which were followed by Congress in enacting, in the Transportation Act of 1920, the limitation provisions in Section 16(3). See the following Annual Reports of the I.C.C.: No. 27 (1913) pp. 80-81; No. 28 (1914) p. 65; No. 29 (1915) p. 68; No. 31 (1917) p. 68. In *United States* v. *Director General,* 80 I.C.C. 143, 150-151, that agency, whose interpretations of Interstate Commerce Act provisions recommended by it to Congress are entitled to even more than their "great weight" (*United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549), held that there was nothing in the Act's exceptions with respect to the Government which would warrant implying one where none had been expressed. Indeed, it stressed specific exceptions elsewhere in the Act as a basis for its decision that the language of Section 16 even included the Government as plaintiff.

state Co. v. *Penna. R. Co.*, 320 U. S. 356, at 365-366, of "assuming * * * that * * * section [16(3)] reflects only the Act's general policy against discrimination in respect to rates, rebates, etc." while overlooking that "this is true only so far as that policy is consistent with the particular policy laid down by the section, namely, that of strictly limiting the time within which claims may be asserted * * *." This "particular policy" would seem to be at least as relevant to suits against the Government as to suits against any other shipper.

Ignoring the special purpose of Section 16(3), the court below has ignored as well the unbroken series of decisions in which this Court has enforced that purpose by holding that the section's limitations put terms to the substantive rights they govern. Lapse of the specified time does not merely bar the remedy sought; it destroys the asserted right. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667-668; *Louisville Cement Co.* v. *Int. Com. Comm.*, 246 U. S. 638, 642; *Kansas City So. Ry.* v. *Wolf*, 261 U. S. 133, 138-140; *William Danzer Co.* v. *Gulf R.R.*, 268 U. S. 633, 636; *Midstate Co.* v. *Penna R. Co., supra.*

When *Southern Pac. Co.* v. *United States, supra,* was decided, this Court had not yet applied this uniform substantive characterization specifically to subdivision (a) of Section 16(3), limiting suits by carriers against shippers. But this specific extension, following inevitably from the consistent construction of Section 16(3), came in *Midstate Co.* v. *Penna. R. Co., supra.* In adhering to its *Southern Pacific* decision, the court below endows the merely "negative" restriction (see p. [—], *supra*) of 28 U.S.C. 2501 with the power of reviving a cause of action which no longer exists. 28 U.S.C. 2501 does not begin to operate unless there is involved a "claim of which the Court of Claims has jurisdiction

* * *." As applied below, this statute has had the startling effect of creating a right where there was no "claim" to which Court of Claims jurisdiction could attach. Cf. *Finn* v. *United States*, 123 U. S. 227, 232; *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667.

3. In adhering to its decision in *Southern Pac. Co.* v. *United States, supra*, the court below suggests that the subsequent failure of Congress to change Section 16 (3)(a) constitutes implied approval of the holding in that case (R. 27-28). As this Court has frequently declared, however, particularly where statutory language is clear and unambiguous, there is no reason to "expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." *Jones* v. *Liberty Glass Co.*, 332 U. S. 524, 534; cf. *Helvering* v. *Hallock*, 309 U. S. 106, 119-120.

Of greater significance than congressional silence is the recent Act of June 29, 1949, Pub. L. No. 138, 81st Cong., 1st sess., which adds to Parts II, III and IV of the Interstate Commerce Act (covering, respectively, motor carriers, water carriers and freight forwarders) provisions establishing the same limitations as those in Part I, Section 16(3). This statute is designed to establish uniformity among the four parts of the Act. S. Rep. No. 83, 81st Cong., 1st sess., p. 1; H. Rep. No. 766, 81st Cong., 1st sess., pp. 1-2. The language used in fixing periods of limitation is, except for insignificant changes of phraseology, the same as that of Section 16(3). Speaking of these sections in an identical predecessor bill (H. R. 2759, 80th Cong., 1st sess.), Congressman Wolverton, Chairman of the House Committee on Interstate and Foreign Commerce and sponsor of the bill, declared unequivocally that their terms would apply to the Government.[6] Later, the House

[6] "Mr. WOLVERTON. * * * I think it clear that the limitations for which the bill provides would apply to the United States as a

Committee, in reporting the bill which was enacted (S. 257, 81st Cong., 1st sess.), reserved judgment as to whether these provisions "apply to proceedings *instituted by the United States* but * * * left that question for determination judicially as appropriate cases may arise." H. Rep. No. 766, *supra,* at p. 2 (italics supplied).

Even if Chairman Wolverton's remarks are to be read, in the light of the Committee report, as applying to the more difficult cases in which the United States is plaintiff, it is absurd to attribute to Congress the view that the short statute bars the United States as plaintiff but does not protect it as defendant. *Stanley* v. *Schwalby,* 147 U. S. 508, 515-517. Cf. *United States* v. *Interstate Commerce Commission,* No. 330, October Term, 1948. Congressional sentiment ranges, rather, from a rejection of the *Southern Pacific* decision and the decision below to a belief that the applicability of the Interstate Commerce Act limitations provisions to cases in which the United States is a party remains an open question. This state of the Congressional mind underlies the need for clarification by this Court.

4. The importance of the question herein, enhanced by recent Congressional action (Point 3, *supra*), can be measured by the Government's enormous expeditures for transportation and by the inevitable mass of litigation to which they give rise. An authoritative ruling by this Court is needed to determine whether the Government, prepared to pay cash for its transportation (49 U.S.C. 66), is to be subjected to suits up to four years later than similar suits must be brought against private shippers, with all the attendant disruption of

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shipper, just as to any other shippers. * * * I think, too, that there is every reason why these limitations should apply to the United States the same as to any other shipper." 94 Cong. Rec. 131.

The I.C.C., adhering to its position in *United States* v. *Director General, supra,* shares this view. *Ibid.*

Governmental fiscal management which this discrimination implies. Such a ruling will serve to dispose of a great number of cases now pending, not only in the Court of Claims,[7] but in the district courts as well,[8] in which the Government has interposed or will interpose the defense of Section 16(3)(a).

Moreover, apart from the Government's interest as shipper, it is important to determine whether the "paramount policy of § 16 * * * to secure promptness in collection * * *" (*Midstate Co.* v. *Penna. R. Co.*, 320 U. S. 356, 367) is to be emasculated by being made inoperative as to the largest single client of the nation's carriers.

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JULY, 1949.

2. Excerpt from the Government's petition for a writ of certiorari in *United States* v. *Union Pacific Railroad Company*, October Term, 1949, No. 580, pp. 4-12.

* * * * *

REASONS FOR GRANTING THE WRIT

The Court of Claims has adhered to its prior decision in *Seaboard Air Line Railroad Co.* v. *United States*, 113 C. Cls. 437, following the refusal of this Court to review that decision (338 U.S. 848).[9] A survey, made

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[7] E.g., *Union Pac. R. Co.*, No. 46989; *Chicago & Eastern Ill. R. Co.*, No. 47575; *Pennsylvania R. Co.*, No. 48473; *Atlantic Coast Line R. Co.*, No. 48825.

[8] E.g., *Chicago & Northwestern Ry Co.* v. *United States*, E.D. Wis., Civil No. 4513; *Northern Pac. Ry Co.* v. *United States* (3 cases), D. Minn., Civil Nos. 1099, 1105, 1106; *New York, Chicago & S. L. R.R. Co.* v. *United States*, N.D. Ohio, Civil No. 26337; *Pacific Electric Ry. Co.* v. *United States*, S.D. Cal., Civil No. 7821-BH.

[9] In addition to the instant case, see *Atlantic Coast Line R. R. Co.* v. *United States*, C. Cls. No. 48826, decided December 5, 1949.

shortly after the decision in the instant case to determine the present importance of the question involved, discloses 123 actions, pending in the Court of Claims and filed more than two years after completion of their services, in which carriers are seeking to recover $11,423,799.98 in charges from the Government.[4] In these suits, the number of which reflects the extent of the Government's role as the nation's largest shipper, it is now futile to continue to interpose the defense which seems to be afforded by Section 16(3)(a) of the Interstate Commerce Act. Accordingly no course is open to the Government in the Court of Claims, other than to abandon that defense, which in many of the cases is the only one available, unless review of the instant decision can be had. Because we believe the court below errs in its refusal to apply Section 16(3)(a) to suits against the Government; because of the magnitude, both in number and amount, of the claims involved; because of the recurrent character of the problem; and because of the peculiar factor in relation to the *Seaboard* petition discussed in the following paragraph, we again seek review.

In the *Seaboard* case (No. 212, this Term), the brief opposing our petition for certiorari was rested almost exclusively upon the argument that the claim involved was for railway mail pay, was not governed by the provisions of the Interstate Commerce Act and was therefore of no general importance. While the court below, in dealing with the present problem, does not suggest any distinction between suits for mail pay and suits for other transportation charges (see instant opinion, R. 8), it is possible that the argument urged by the respondent in the *Seaboard* case has merit, or at least may have had an important part in the denial of our

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[4] The same question is involved in approximately 135 cases now pending in the district courts involving about $465,000.

petition therein. The question of importance as to the general applicability of Section 16(3)(a) to suits against the Government, which we thought was presented by the *Seaboard* case, cannot be avoided in the case at bar.[5] Unless the Court of Claims is justified in reading the statutory limitation on "all actions at law by carriers" as if it said "all actions at law by carriers except actions against the Government," respondent has no right to recover.

1. The inclusive and unambiguous language of Section 16(3)(a), with no remote suggestion of any exception, in a comprehensive and frequently reconsidered statute in which exceptions are made explicit where they are intended, would appear to preclude the result reached by the court below. There is nothing in the legislative history or purpose of the section to warrant judicial addition to the words Congress choose. See *Browder* v. *United States,* 312 U. S. 335, 338. Indeed, the "paramount policy of § 16 * * * to secure promptness in collection * * *" (*Midstate Co.* v. *Penna. R. Co.,* 320 U. S. 356, 367) requires, in serving the important regulatory purpose of keeping carriers' financial affairs relatively current, that there be no exception with respect to the carriers' largest single client.

Finding no exception in the plain language of Section 16(3)(a), the court below justifies its exclusion of suits against the Government essentially on the grounds that (1) to apply it to such suits would effect a repeal by implication of 28 U. S. C. 2501, which permits claims over which the Court of Claims has jurisdiction to be sued upon within six years of their accrual (see *Southern*

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[5] We assume that the denial of certiorari is not to be interpreted as expressing any view on the merits of the controversy. See, *e.g.*, the opinion of Mr. Justice Frankfurter respecting the denial of the petition for writ of certiorari in *State of Maryland* v. *The Baltimore Radio Show, Inc.,* 338 U. S. 912, 917-919.

Pacific Co. v. *United States,* 62 C. Cls. 391, 398), and (2) the Government is different in relevant respects, from other shippers (*id.* at 399-402).[6] Neither of these arguments, we submit, will bear analysis.

Hesitancy to construe statutes as effecting repeals by implication is limited by the well-defined principle that a statute applicable to a specific class of cases will, within that class, supersede a more general statute. *MacEvoy Co.* v. *United States,* 322 U. S. 102, 107; *Shelton* v. *United States,* 165 F. 2d 241 (C.A.D.C.). This principle, precisely relevant here, has operated to bar suits against the Government brought within the six-year jurisdictional limitation period but not within the lesser period prescribed for the cause of action under a specific statute. *United States* v. *A. S. Kreider Co.,* 313 U. S. 443 (five years, under Revenue Act of 1926, § 1113(a), 44 Stat. 9, 116); *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326 (C. A. 8) (two years, under R. S. 3227, 26 U. S. C. 3772); *Kahn* v. *United States,* 55 C. Cls. 271, affirmed, 257 U. S. 244 (same); *Fort Pitt Gas Co.* v. *United States,* 49 C. Cls. 224 (same); cf. *Mejia* v. *United States,* 152 F. 2d 686 (C. A. 5) certiorari denied, 328 U. S. 862 (one year,

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[6] *Southern Pacific Co.* v. *United States, supra,* was the first decision in which the Court of Claims held inapplicable in suits against the Government the limitations now appearing in Section 16(3)(a), after announcing a contrary view in earlier decisions. See *Schaff* v. *United States,* 59 C. Cls. 318, 321-322; *Lancaster* v. *United States,* 60 C. Cls. 80; *Central R. R. Co. of New Jersey* v. *United States,* 60 C. Cls. 578, *certiorari dismissed,* 270 U. S. 644; *Wabash Ry. Co.* v. *United States,* 59 C. Cls. 322, affirmed, 270 U. S. 1; *Northern Pac. Ry. Co.* v. *United States,* 59 C. Cls. 122; *Western Pac. R. R. Co.* v. *United States,* 59 C. Cls. 67, reversed on other grounds, 268 U. S. 271. The reasoning of the *Southern Pacific* decision was reaffirmed in *Seaboard Air Line Railroad Co.* v. *United States, supra,* which is in turn announced as the authority for the present decision. Accordingly, we direct our arguments here to the grounds stated by the court in the *Southern Pacific* case.

Louisiana wrongful death statue). In *United States* v. *A. S. Kreider Co., supra,* referring to the provision in Section 24(20) of the Judicial Code (now 28 U. S. C. 2401(a)), fixing for Tucker Act suits in the district courts the same general six-year limitation applicable in the Court of Claims, this Court said (313 U. S. at 447):

> We think the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24(20). Clearly, nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions even though they are brought under § 24(20). Phrasing the condition negatively, Congress left it open to provide less liberally for particular actions which, because of special considerations, require different treatment.

The two-year limitation contained in Section 16(3)(a) is a measure of the carrier's right to sue for its charges; lapse of the specified time destroys the right. *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662, 667-668; *Louisville Cement Co.* v. *I. C. C.,* 246 U. S. 638, 642; *Kansas City So. Ry.* v. *Wolf,* 261 U. S. 133, 138-140; *William Danzer Co.* v. *Gulf R. R.,* 268 U. S. 633, 636; *Midstate Co.* v. *Penna. R. Co., supra.* In refusing to enforce this limitation in suits against the Government, the court below endows the merely "negative" restriction of 28 U. S. C. 2501 with the power of reviving a cause of action which no longer exists. The six-year limitation in 28 U. S. C. 2501 applies to claims "of which the Court of Claims has jurisdiction * * *." As applied below, this statute has the unintended effect of creating a right where there is no "claim" to which Court of Claims jurisdiction can attach. Cf. *Finn* v.

United States, 123 U. S. 227, 232; *Phillips* v. *Grand Trunk Ry., supra,* at 667.

This result, unwarranted by the principle of statutory construction invoked by the court below, finds equally little justification in any supposedly or actually unique characteristics of the Government as shipper or litigant. In *Southern Pacific Co.* v. *United States, supra,* the Court of Claims supported its refusal to apply the two-year limitation in suits against the Government by pointing to the presence of two exceptions for Government transportation in the Interstate Commerce Act—49 U. S. C. 22, permitting carriers to provide such transportation free or at reduced rates, and 49 U. S. C. 3(2), permitting extension of credit to the Government without authorization by the Interstate Commerce Commission. But these provisions in no way affect either the feasibility or the desirability of requiring carriers to bring suit for their charges within two years. If anything, such explicit exceptions for Government transportation tend to support the conclusion that none were to be implied elsewhere in the Act.[7]

Finally, contrary to the suggestion in *Southern Pacific Co.* v. *United States, supra,* at 401, the carrier is

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[7] This conclusion has been adopted by the Interstate Commerce Commission, the repeated recommendations of which were followed by Congress in enacting, in the Transportation Act of 1920, the limitation provisions in Section 16(3). See the following Annual Reports of the I.C.C.: No. 27 (1913) pp. 80-81; No. 28 (1914) p. 65; No. 29 (1915) p. 68; No. 31 (1917) p. 68. In *United States* v. *Director General,* 80 I.C.C. 143, 150-151, that agency, whose interpretations of Interstate Commerce Act provisions recommended by it to Congress are entitled to even more than their ordinarily "great weight" (*United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549), held that there was nothing in the Act's exceptions with respect to the Government which would warrant implying one where none had been expressed. Indeed, it stressed specific exceptions elsewhere in the Act as a basis for its decision that the language of Section 16 even included the Government as plaintiff.

not hindered in suing the Government, like any other shipper, within two years by the fact that the Government, required to pay transportation bills on presentation (49 U. S. C. 66), may deduct any overpayments from amounts subsequently found to be due the carrier. The carrier's cause of action accrues when it makes delivery. If it is paid no suit is necessary. If it is not paid at all or only paid in part as a result of a deduction because of prior overpayments, the carrier's time to sue runs from the time when the deduction was made, not from the time of the original shipment. Cf. *Wabash Ry. Co.* v. *United States,* 59 C. Cls. 322, 327-328, affirmed, 270 U. S. 1. In such cases, questions relating to earlier shipments, on which the Government claims overpayments were made, would be matters of defense for the Government, not part of the carrier's cause of action for its charges presently withheld in whole or in part.

2. The importance of the question herein, measured in part by the large number of pending suits in which it is presented (see p. 4[ ], *supra*), has recently been enhanced by the Act of June 29, 1949, Pub. L. No. 138, 81st Cong., 1st sess., which adds to Parts II, III, and IV of the Interstate Commerce Act (covering, respectively, motor carriers, water carriers, and freight forwarders) provisions establishing the same limitations as those in Part I, Section 16(3). This statute is designed to establish uniformity among the four parts of the Act. S. Rep. No. 83, 81st Cong., 1st sess., p. 1; H. Rep. No. 766, 81st Cong., 1st sess., pp. 1-2. Referring to the new provisions, substantially identical in phraseology with Section 16(3), the House Committee on Interstate and Foreign Commerce expressly reserved judgment as to whether they "apply to proceedings instituted by the United States but * * * left that question for determination judicially as appropriate

cases may arise." H. Rep. No. 766, *supra*, at p. 2.[8] Earlier, speaking of identical provisions in a predecessor bill (H. R. 2759, 80th Cong., 1st sess.), Chairman Wolverton of the House Committee declared unequivocally that their terms would apply to the Government.[9] These congressional views underline the need for resolution by this Court of a question which now affects the numerous suits against the Government by carriers of all types in both the district courts and the Court of Claims.

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FEBRUARY, 1950.

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[8] While the quoted language refers to "proceedings instituted by the United States," it would be absurd to attribute to Congress the belief that the short statute of limitations might bar the United States as plaintiff but afford it no protection as defendant. Cf. *Stanley* v. *Schwalby*, 147 U. S. 508, 515-517.

[9] "Mr. Wolverton. * * * I think it clear that the limitations for which the bill provides would apply to the United States as a shipper, just as to any other shippers * * *. I think, too, that there is every reason why these limitations should apply to the United States the same as to any other shipper." 94 Cong. Rec. 131.

The I. C. C., adhering to its position in *United States* v. *Director General*, *supra*, note 7, shares this view. *Ibid.*

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